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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term 2003

PAUL HOUGHTON, BILLIE HENDERSON, et al.

Petitioners,

vs.

DEPARTMENT OF HEALTH, THE OFFICE OF RECOVERY SERVICES, THE DEPARTMENT OF HUMAN SERVICES and THE STATE OF UTAH et al

Respondents.

Petition for Writ of Certiorari to the Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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82 pp

QUESTION PRESENTED

Do the anti-lien provisions of federal law preempt provisions of the Utah Code which allow for a priority lien on non-medical portions of a Medicaid recipient's third-party tort recovery?

PARTIES TO THE PROCEEDING

The petitioners herein are Paul Houghton, Billie Henderson, Damian Henderson and Wayne Rubens. At the time the class action was filed in 1995, Houghton was an individual who resided in the State of California, but had previously resided in Utah, and was in Utah in April, 1993, when he had a serious accident and became a Medicaid recipient. The Hendersons both resided in Salt Lake County, Utah at the time the action was filed, and were Medicaid recipients. Rubens also resided in Salt Lake County, Utah at the time the action was filed. Each of the named plaintiffs had a third party tort action against which the Utah Medicaid office asserted repayment liens at the time of settlement. This matter was certified as a class action by a Utah State District Judge on January 29, 1996. Accordingly, the petitioners act also as class representatives for a certified class.

The respondents are the State of Utah and Utah's Department of Health, as well as the Office of Recovery Services, which are divisions of the Utah Department of Human Services. Other respondents include Rod L. Betit, the Director of the Department of Health and the Department of Human Services, as well as Emma Chacon, the Executive Director of the Office of Recovery Services. All respondents are agencies or departments of the State of Utah, or employees thereof acting within the scope and course of their employment.

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SUMMARY OF ABBREVIATIONS AND TERMS

MA - Medical Assistance Paid to a Recipient by the State under the Medicaid Program

R.___ - Official Record Citations

SSA - Social Security Act

TPL - Third-Party Liability

Medicaid - This term, when capitalized, is a shorthand reference to the State Medicaid Program or the Medicaid Office that administers the program

CONVERSION TABLE OF PARALLEL CITATIONS OF THE SOCIAL SECURITY ACT

The following is a conversion chart for the citations in the Social Security Act and in the United States Code:

Social Security Act	United States Code
§ 1902(a)(18)	§ 1396a(a)(18)
§ 1902(a)(25)	§ 1396a(a)(25)
§ 1912(a)(1)	§ 1396k(a)(1)
§ 1912(a)(2)	§ 1396k(a)(2)
§ 1917(a) & (b)	§ 1396p(a) & (b)
§ 1902(d)(4)	§ 1396a(d)(4)

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Petitioners Houghton, Henderson and Rubens, on behalf of themselves and as class representatives for Class I and II plaintiffs, respectfully request that this Honorable Court issue a Writ of Certiorari to review Part II the judgment of the Utah Supreme Court entered on October 18, 2002, which upheld the legality of Utah's priority lien against the property of Medicaid recipients for reimbursement of medical assistance paid. [No writ is sought and no appeal is taken from Part III of the Decision, which dealt with the rights of Class II plaintiffs for *attorney fees* under State law, since that decision was reversed by the Utah Supreme Court in favor of Petitioners. However, the Class II plaintiffs also have been damaged by the illegal priority liens, which is part of this Petition.]

OPINION BELOW

This matter was originally determined by the trial court on summary judgment. On October 23, 2000, the trial court dismissed the causes of action of both Class I and Class II plaintiffs. The matter was appealed directly to the Utah Supreme Court, which held in favor of the Respondent State of Utah in a 4 to 1 decision issued October 18, 2002, on the issue dealing with the legality of the State's priority lien, but reversed the trial court's decision dismissing the claim for attorney fees under State law. *See* Appendix A, *Houghton v. Department of Health,* 2002 UT 101, 57 P.3d 1067 (Utah 2002).

STATEMENT OF JURISDICTION

Petitioners seek review of Part II of the judgment of the Utah Supreme Court dated October 18, 2002, *Houghton v. Department of Health,* 2002 UT 101, 57 P.3d 1067 (Utah 2002), wherein the Utah Supreme Court upheld the legality of Utah's

priority lien against the property of Medicaid recipients.[1] This Petition for Certiorari was filed within 90 days of the October18, 2002, Utah Supreme Court Opinion, which upheld dismissal of the class action challenging the legality of the State's priority lien against Medicaid recipients.

Jurisdiction is invoked under 28 U.S.C. § 1257(a), which provides that this Court may review the decision of the highest court of a state of the United States of America, where "the validity of . . . a statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to . . . laws of the United States."

STATUTORY PROVISIONS INVOLVED

The major constitutional and statutory provisions involved in this case are:

1. The Supremacy Clause - United States Constitution, Article VI, Clause 2.

> This constitution, and the laws of the United States . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

(Original capitalization.)

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[1] For historical reference, the case had been to the Utah Supreme Court one other time. Shortly after the case was filed, the State defendants made a motion to disqualify counsel because of an alleged conflict of interest. The Utah Supreme Court unanimously reversed the District Court's Order of Disqualification in *Houghton v. Dept. of Health*, 962 P.2d 58 (Utah 1998). This matter is resolved and not at issue in this Petition.

2. Federal Anti-Lien Statute - 42 U.S.C. § 1396p(a)(1) and (b)(1).

> No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except . . . [exceptions not relevant to this case, but set forth in full in Appendix B].
>
> No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except . . . [exceptions not relevant to this case, but set forth in full in Appendix B].

See Appendix B.

3. Mandatory Compliance With § 1396p - 42 U.S.C. § 1396a(a)(18).

> A State plan for medical assistance must - (18) comply with the provisions of section 1396p of this title with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts;

4. State Statute Allowing Priority Lien - Utah Code Ann. § 26-19-5(1) (1998).

> The department's claim to recover medical assistance provided as a result of such an injury, disease, or disability shall be a lien against any proceeds payable to the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4).

See Appendix C.

5. Second Statute Allowing Liens - Utah Code Ann. § 26-19-13(1) (1998).

> No lien or encumbrance shall be imposed against the property of a recipient before his death because of medical assistance correctly paid or to be paid on his behalf before he is 65 years of age, except as provided by Subsections 26-19-7(2) and (3).

6. State Lien Enforcement - Utah Code Ann. § 26-19-7(2) (1998).

> (2) If the recipient proceeds without the department's written consent as required by Subsection (1)(a), the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

See Appendix D.

7. State Obligation to Pursue Third Parties - 42 U.S.C. § 1396a(a)(25)(A).

> (A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 U.S.C.A. § 1167(1)]), service benefit plans, and health maintenance organizations) to pay for care and services available under the plan, including-- . . . .

See Appendix F.

8. Conflict with Federal Law Not Allowed - Utah Code Ann. § 26-19-17 (1998).

> In no event shall any provision contained in this chapter be applied contrary to existing federal law.

See Appendix E.

STATEMENT OF THE CASE

A. Procedural History

This case was filed as a class action in the Third District Court of Salt Lake County, Utah on October 27, 1995. R. 1. Plaintiffs alleged that the State of Utah, acting through its Office of Recovery Services of its Department of Health, had illegally levied priority reimbursement liens against settlement monies on their claims against third party tortfeasors. R. 22-23. The State was taking a priority reimbursement for the full amount of its Medicaid lien against the recipients' third party tort recoveries, which priority recovery for the State had the effect of eliminating or disproportionately reducing the recipients' non-medical assistance claims for such common tort damages as pain and suffering, impaired earning capacity, emotional distress and future medical needs, which claims are clearly the property of the Medicaid recipient.

The trial court certified two classes of plaintiffs on January 29, 1996. R. 98-101. Class I members are injured Medicaid recipients who had third party liability ("TPL") claims, but who did not retain an attorney to represent them. R. 100. Class II members are identical to Class I except that they had retained attorneys who had assisted them in gaining their recoveries. R. 100. Both classes

had tort settlements or judgments which were subject to the State of Utah's illegal priority liens.

Appellants attempted discovery which was met with a motion to disqualify counsel. R. 102-05, 106-08. The trial court issued a protective order barring discovery on April 23, 1996, and granted the State's motion to disqualify on June 21, 1996. R. 109-110, 231. The disqualification order was appealed to the Utah Supreme Court which reversed on July 14, 1998 and remanded to the trial court with an order to reinstate Appellants' counsel. *Houghton v. Department of Health*, 962 P.2d 58, 63 (Utah 1998).

In renewed proceedings before the trial court, Appellants moved for a scheduling conference on November 20, 1998. R. 427-29. On November 27, 1998, the Utah Supreme Court issued its opinions in *Wallace v. Jackson*, 972 P.2d 446 (Utah 1998)[2], and *S.S. v. State*, 972 P.2d 439 (Utah 1998), which declared that the State's lien against TPL proceeds was legal because the settlement was deemed to be not the recipient's property, but the property of a third person, e.g., the insurance company.

Subsequently, the State filed a motion to dismiss pursuant to Rule 12(c) of the Utah Rules of Civil Procedure on October 27, 1999. R. 430-31. The trial court denied this motion, but in its minute entry indicated that the precedent set in *Wallace* and *S.S.* had effectively negated all issues in the Appellants' Complaint *except* the State's liability for attorney fees. R. 491. Going forward solely on the attorney fee issue, the State moved for summary judgment. R. 544-87, 572-78. The trial court granted the State's motion for summary judgment on October 23, 2000. R. 703-06.

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A prior Petition for Certiorari was filed with this court on *Wallace* and denied in *McNeil v. Utah,* 528 U.S. 810 (1999).

When the trial court granted summary judgment on October 23, 2000, it dismissed the causes of action of both Class I and Class II plaintiffs dealing with the claimed illegal priority lien. The matter was appealed directly to the Utah Supreme Court, which held in favor of the Respondent State of Utah in a 4 to 1 decision issued October 18, 2002, on the issue dealing with the legality of the State's priority lien, but reversed the trial court's decision dismissing the claim for attorney fees under State law. *See* Appendix A, *Houghton v. Department of Health,* 2002 UT 101, 57 P.3d 1067 (Utah 2002).

B. The Class Petitioners

Named plaintiffs are representatives of classes which consist of persons, and the estates of deceased persons, who had third party liability (TPL) claims, received Medicaid "medical assistance" (MA") from the Utah State Department of Health ("the State"), and who have been compelled to pay or relinquish all or significant portions of their TPL recoveries to the State as reimbursement for medical assistance. R. 82. The parties stipulated to class certification (R. 97) and the trial court entered an order certifying the two plaintiff classes on January 29, 1996. R. 98-101. Class I plaintiffs, represented by Paul Houghton, are individuals injured by the acts of a third party, who became Medicaid recipients, who had a lien placed on their recoveries by the State of Utah pursuant to the Medical Benefits Recovery Act, Utah Code Ann. § 26-19-1, *et seq.*, and who did not have counsel in their negotiations with the State regarding its claim of lien. R. 100. Class II plaintiffs, represented by Damian Henderson, Billie Henderson, and Wayne Rubens, are identical in every respect to Class I plaintiffs except that they had retained counsel and actually filed actions, or made claims through attorneys, against the liable third parties. R. 100. Both classes were

subject to the State's priority liens, which are claimed to be illegal in this Petition.

The number of potential class members in both classes is likely very large, since the State has asserted and collected priority liens for many years. *See Camp v. Office of Recovery Svcs.*, 779 P.2d 242 (Utah 1989).

C. The Medicaid Program and Recovery Liens.

Medicaid is a state-administered federal program to provide medical assistance ("MA") to the poor. R. 199, 464. In 1994-1995, three-quarters of the Medicaid funds in Utah came from the federal government and one-quarter from the state. Extensive federal statutory language both prescribes and proscribes state actions. *See* Appendices B, F and G.

When a person is injured by the negligence of a third party tortfeasor and rendered indigent, that person qualifies for "medical assistance" under the Medicaid program. However, the injured person is required to assign to the State a claim for the amount of the *medical assistance actually paid* by the State. That claim is protected by law and is left to the State to pursue. The injured recipient cannot bring that claim as part of his/her own tort action without the State's written consent. However, other statutes acknowledge and protect the injured recipient's right to bring an independent third party tort claim against a tortfeasor ("TPL claim") for other traditional tort damages, as long as that claim does not also include the State's right of action for the *medical assistance* actually paid. With this exception, the Medicaid recipient's own tort claim is unrestrained.

A federal anti-lien statute **prohibits state liens** or recoveries against a *living Medicaid recipient* for benefits *correctly paid.* Statutory Provision No. 2, Appendix B. No claim is made by the State that Petitioners were incorrectly paid any Medicaid benefits.

By contrast, the Utah Medicaid statute **allows liens** against recipients. Statutory Provision Nos. 4, 5 and 6; Appendices C, D and E.

D. Devastating Impact of Priority Lien.

The State's priority has the effect of a super lien directly on the recipient because the lien pays 100% and pays first. Thus, the lien takes a disproportionate share of the recovery, often wiping out the recipient's portion entirely. This is especially true with modest insurance settlements which are inadequate to pay all damages.

An example illustrates the catastrophic impact of the lien. If a 39 year single working mother with no medical insurance sustained a work-ending injury in a car wreck, the damages might easily be $500,000 (past medical expenses, future medical expenses, lost past earnings, impaired earning capacity for 25 years, pain and suffering, emotional distress, etc.). If Medicaid had paid $107,000 in medical assistance, and the combined insurance coverages (tortfeasor's liability and the mother's underinsurance) were $110,000, the priority lien of $107,000 would essentially wipe out the recipient's other claims, which are not assigned to the State.[3]

E. First Impression.

This Court has never addressed the basic legality of the lien, nor has it ever addressed the effect of the priority. Since the priority lien often devastates an indigent, severely injured recipient, its legality needs to be carefully examined by this Court.

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[3] These are the actual facts in another case pending before the Utah Supreme Court. *State v. Streight*, UT. S.Ct. Case # 20020572-SC.

F. Relief Requested.

The class members (Petitioners) ask this Court to thoroughly examine the effect and impact of the priority lien, and rule that it constitutes an illegal lien or recovery in violation of the federal anti-lien law, 42 U.S.C. § 1396p(a)(1) and (b)(1). Under existing state statutes, which accord protection to the injured recipient's independent claim for recovery, it is clear that both the State and the injured recipient have valid, cognizable claims against the TPL recovery. Accordingly, this Court should hold that the State's priority claim is illegal, and that the State must *apportion* its medical assistance claim with the injured person's non-medical assistance claims, as is done in many other states. This result would limit states' recoveries to a proportionate amount based upon the combined amount of the state's medical assistance claim and the non-medical assistance claims of the injured recipient.

G. Prior Utah Medicaid Rulings.

The legality of the Utah lien was challenged before, although not on the priority issue. The Utah Supreme Court has held that the federal anti-lien statute, § 1396p (a) and (b), was not in conflict with the state lien statute. *See Wallace v. Jackson, State of Utah, McNeil, et al.*, 972 P.2d 446, 448 (Utah 1998). The majority was of the opinion that prohibiting the assessment of a lien under § 1396p(a) would be in conflict with the federal assignment statute, 42 U.S.C. § 1396a(a)(25)(A), "which mandates states to seek reimbursement from third parties who are legally liable for the medical payments." *Wallace,* 972 P.2d at 448. To solve the "conflict," the Court adopted the extremely novel approach of simply redefining a personal injury settlement as ***"not... McNeil's property."*** *Id.* (emphasis added). Because McNeil's settlement is allegedly not his property, "the federal anti-lien statute is not violated when the State seeks reimbursement in an interpleader action." *Id.*

The two dissenting justices in *Wallace* ardently disagreed with the three-member majority on this issue. The dissent noted that the State's Medicaid law "provide[s] for the State to recover, through a lien on recipients' property," and that the federal statute clearly "conflicts with the state statute and prohibits the State's actions in this case." *Wallace,* 972 P.2d at 449. The dissent strongly rejects the majority's linchpin argument about McNeil's non-ownership of his own settlement:

> The majority achieves an "end run" around this [§ 1396p(a) anti-lien] prohibition through what seems to me the illogical conclusion that the proceeds in dispute are not really McNeil's property, but perhaps his grandmother's or even the State's.

Id. (bracketed portion added). Section 1396p(a) "clearly states" that no lien may be imposed against a recipient and this "expressly applies to any property. . . ." *Wallace,* 972 P.2d at 449. Accordingly, "the majority's result arbitrarily deprives McNeil of his property." *Id.* Furthermore, "the State should not be allowed to pursue [its goal of protecting public money] at the expense of persons Congress sought to protect in creating prohibition against liens of this kind." *Id.* at 450 (bracketed portion added).

The dissent found no conflict with § 1396a(a)(25), which merely mandates that the states ascertain the *"legal liability of third parties."* *Wallace,* 972 P.2d at 450 (italics in original). There are several examples where the federal statutes are clear that states are to pursue third-party liability ("TPL") claims against third parties, and not against the Medicaid recipients. *Id.* Congress obviously intended that Medicaid recipients not be forced "to defend against liens" because that would be "inconsistent with the entire benefit system created by the federal statutes." *Id.* at 451. In the companion case to *Wallace, S.S. v. State,* 972 P.2d 439, 442 (Utah 1998), dealing primarily with special needs trusts, the Utah

Supreme Court reaffirmed its ruling in *Wallace* and upheld the validity of liens on third-party Medicaid settlements.

Two years after *Wallace* and *S.S.*, the Utah Supreme Court once again upheld the validity of Medicaid reimbursement liens against recipients in *State v. McCoy,* 999 P.2d 572 (Utah 2000). *McCoy* reaffirmed the Utah Supreme Court's earlier holding that payments made by a third party do not legally become the property of the recipient until after a final settlement, which includes reimbursement of the Medicaid lien. *McCoy,* 999 P.2d at 575, ¶ 10.

In *Houghton,* the subject of this Petition, the Utah Supreme Court dealt specifically, for the first time, with the effect of a "priority" lien on recipients. The *Houghton* court acknowledged the potential problem that results from the State "reimburse[ing] itself completely and before Medicaid recipients can use the settlement proceeds to satisfy their claims," but disagreed that this amounted to taking the Medicaid recipients' property for "nonmedical claims." *Houghton,* 57 P.3d at 1069, ¶ 8. The Court reaffirmed its earlier ruling that "liens against third-party settlement proceeds are valid because those proceeds do not become a Medicaid recipient's property until Medicaid is reimbursed." *Id.* This is true "even if those proceeds include compensation for nonmedical claims." *Id.*

In her dissent, Chief Justice Christine Durham examined all the applicable federal and state statutes. She concluded that the part of any third-party settlement attributable to tort claims for "pain and suffering, emotional distress, loss of earnings, and other familiar tort claims" represented "unassigned claims" and constitute "the property of the medical assistance recipient during his life, and the State has no right to these claims under the assignment." *Houghton,* 57 P.3d at 1077, ¶ 36, *quoting Martin,* 642 N.W.2d 1 at 23-24 (Minn. 2002). Chief Justice Durham relied heavily on the recent decision of *Martin v. Rochester,* 642 N.W.2d at 57-58. Accordingly, Justice Durham would hold:

> The state obtains the right to precisely what has been assigned; the federal anti-lien provision prevents the state from acquiring a broad and undifferentiated right to collect its reimbursement from any other proceeds payable by the third party to the recipient. A sweeping and indiscriminate right to third-party payments, rejected by the *Martin* court, is precisely what the majority today creates.

Houghton, 57 P.3d at 1077-78.

H. The *Martin* Decision.

The Minnesota Supreme Court recently invalidated a lien similar to Utah's Medicaid lien on grounds of federal preemption. *Martin v. Rochester,* 642 N.W.2d 1 (Minn. 2002). The Minnesota court compared a tort victim's claims to a "bundle of sticks," noting that the federal Medicaid law only required the assignment of one of those "sticks," i.e., the "medical assistance" claim to the State, but allowed other traditional tort causes of action to remain the property of the Medicaid recipient. *Id.* at 30. This analysis was rejected by the majority of the Utah Supreme Court because allegedly the *Martin* result would "jeopardize the ultimate goal of Medicaid – that the program be the payer of last resort." *Houghton,* 57 P.3d at 1069, n. 5. The dissent accepted the *Martin* reasoning. *Id.* at 1077-78.

The State of Minnesota has filed a Petition for Certiorari with the U.S. Supreme Court, U.S. Supreme Court No. 02-117. We understand that this Court has not yet ruled on the Petition, but has referred it to the Solicitor General for comments, which comments have not yet been received.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for two important reasons. *First*, there is a clear and important dispute between state court holdings on the legality of the state Medicaid lien. The *Martin* decision conflicts with split Supreme Court rulings in other states. *See Cricchio v. Pennisi*, 683 N.E.2d 301 (New York 1997); *Wilson v. State*, 10 P.3d 1061 (Wash. 2000), *cert. den.* 532 U.S. 1020 (2001); *Graybear v. North Dakota Dept. of Human Services*, 651 N.W.2d 611 (N.D. 2002); and *Roberts v. Total Health Care, Inc.*, 709 A.2d 142 (Md. 1998). Other states, either by statute and/or case law, hold that the Medicaid lien must be apportioned with the recipient's other tort claims. *See* discussion in Point III below. This is a very important issue that affects thousands of Medicaid recipients each year and involves millions of dollars. Accordingly, because of the conflict in the manner in which the states deal with the issue, and the importance of the issue, this Court should grant certiorari and resolve the issue by holding that state laws granting state Medicaid agencies priority liens are preempted by the federal anti-lien provisions that prohibit such liens.

Second, this Court should grant the Petition for Certiorari because Utah's priority lien statutes, Utah Code Ann. §§ 26-19-5(1) and -7(2) not only directly contradict federal law, but create an unjust lien recovery scheme which damages or impoverishes Medicaid recipients by unfairly taking a disproportionate shares of their meager tort recoveries.

POINT I

— Two Separate Claims —

UTAH AND FEDERAL LAW BOTH CONTEMPLATE OR IMPLY THAT A TORT VICTIM WHO IS A MEDICAID RECIPIENT HAS AT LEAST TWO CLAIMS, ONE FOR RECOVERY OF MEDICAL ASSISTANCE PAID BY MEDICAID AND ONE FOR OTHER TRADITIONAL TORT DAMAGES. THE STATE HAS A RIGHT TO AN ASSIGNMENT ONLY OF THE CLAIMS FOR MEDICAL ASSISTANCE PAID, BUT NOT FOR OTHER TORT DAMAGES.

Any discussion of this issue should begin with a determination of exactly what federal and Utah state law require the Medicaid recipient to assign to the State. Only then can the legality of the lien be determined.

A. State Claim Limited to Medical Assistance Paid.

Federal law limits state claim to medical assistance ("MA") paid. Federal law requires that a condition of eligibility for a Medicaid recipient is assignment to the state of the recipient's "rights . . . to payment for medical care from any third party." 42 U.S.C. § 1396k(a)(1)(A) (2001). *See* Appendix G. The recipient's rights to payment for medical care are deemed assigned to the state by operation of law. 42 U.S.C. § 1396a(a)(25)(H) (Supp. 2002) ("state is considered to have acquired the rights of such individual to payment by any other party for such healthcare items or services"). Federal law requires a state to seek reimbursement, but only for MA paid:

> (a) A state plan for medical assistance must . . . (25) provide . . . (B) that in any case in which such a legal liability is found to exist after ***medical assistance*** has been made available on behalf of the individual . . . the state ***will seek reimbursement for such assistance*** to the extent of such legal liability.

42 U.S.C. § 1396a(a)(25)(B) (Supp. 2002) (emphasis added). The state is also mandated to pursue legal liability claims against third parties "to pay for care and services under the plan." 42 U.S.C. § 1396a(a)(25)(A) (Supp. 2002). The rights deemed assigned to the state are limited to "the rights of such individual to payment by any other party for such healthcare items or services." 42 U.S.C. § 1396a(a)(25)(H).

It is clear as a matter of law that the only "right" under federal law that the state may obtain is the right to seek reimbursement of MA paid from liable third parties. These statutes not only unambiguously limit a state's Medicaid claim to medical assistance paid, but clearly imply that the recipient is the owner of all other non-medical assistance claims.

B. State Law Limits Assignment to Medical Assistance Only.

State law likewise limits the state to only what the state has actually paid, and specifically holds that the recipient has other claims. Section 26-19-4.5(1)(a) limits the amount of the department's assigned right "to the ***extent that medical assistance is actually provided*** to a recipient." (Emphasis added.) This "actually provided" limit is reiterated elsewhere in the Act. For example, § 26-19-5(1)(a) limits the department's recovery right against a third party to "the medical assistance" paid.[4] Federal law

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[4] The flip side of the State's right of recovery is a protection for the

also prohibits a state from seeking recovery for more than the "medical assistance" paid. 42 U.S.C. § 1396k(A)(1)(a) (2001). This limitation on the State's right is important because it means that without "priority," the State must stand on equal footing with all other claimants to a TPL settlement. This implies apportionment.

C. An Injured Recipient Has an Independent Claim.

TWO independent, separate claims are contemplated by the statutes, one by the State and the other by the recipient. An injured recipient's right to bring an independent claim to settlement proceeds is confirmed by statutes and case law. Section 26-19-5(5) gives the department a right to commence its own independent action against a third party, but "does not bar an ***action by a recipient*** . . . for loss or damage ***not included in the department's action.***" (Emphasis added.) In other words, the recipient has his/her own claim and may file it, without restriction, as long as it does not include a claim for the MA paid by the department.

Section 26-19-7(1)(a) reaffirms the existence of **two claims** when it says that the recipient may not file or settle a claim against the third party "for recovery of ***medical costs for an injury . . . for which the department has provided*** . . . medical assistance." (Emphasis added.) In other words, the injured person is free to claim for the non-medical assistance damages. Furthermore, even though the department has a right to bring an independent action against the third party under § 26-19-6, the recipient has an absolute right to "intervene in the department's action at any time before

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recipient as well. Since the department may not seek recovery against the third party *for any more* than the "assistance" *actually paid,* the recipient's claim for non-medical assistance damages (i.e pain and suffering, wage loss, future medical etc.) is preserved and unimpaired.

trial." *Id.* The department must also give the recipient notice of: the right to intervene in the proceeding, the recipient's right to obtain a private attorney, and "the department's ***right to recover medical assistance*** directly from the third party." *Id.* (emphasis added).

In sum, both Medicaid ("the department") and the injured person have separate claims against the same proceeds in the hands of the third party. They can prosecute them *separately,* or *together* by intervening in each other's actions. It is clear that the recipient has no right to sue or recover the State's MA claim, but it is equally clear that the State has no right to any portion of the recipient's claim (as long as the recipient does not include the amount paid by the State for medical assistance). The provisions of § 26-19-6 (i.e., rights to notice and to intervene) confirm a State duty to protect, or at least not impair, the recipient's action.

POINT II

– Federal Law Prohibits Liens on Medicaid Recipients –

FEDERAL LAW UNAMBIGUOUSLY PROHIBITS AND PREEMPTS LIENS OR RECOVERIES AGAINST A MEDICAID RECIPIENT.

A. The Federal Anti-Lien Statute.

Liens and recoveries against recipients are prohibited by federal law:

> ***No lien may be imposed*** against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . (exceptions inapposite in this case).
>
> ***No adjustment or recovery*** of any medical assistance correctly paid on behalf of an individual under the State plan ***may be made,*** except . . . (exceptions not relevant to plaintiffs in this case).

42 U.S.C. § 1396p(a)(1) and 42 U.S.C. § 1396p(b)(1) (2001) (emphasis added). State plans must "comply with the provisions of § 1396p . . .with respect to liens." 42 U.S.C. § 1396a(a)(18) (2001). Appellants submit that these prohibitions apply directly to the State's application of its priority under § 26-19-5. Since the recipient may maintain his/her own claim outside the State's claim for medical assistance, to the extent that the State exercises its priority and disproportionately reduces or wipes out the recipient's recovery in these other claims, it has recovered against the recipient's property. Whenever the State's priority disproportionately reduces or wipes out the recipient's other rightful claims, it is an illegal lien or recovery under § 1396p.

B. The Federal Anti-lien Statute Preempts the Utah Lien Provision.

The federal anti-lien statute in 42 U.S.C. §1396p(a)(1) and (b)(1) preempts Utah Code Ann. § 26-19-5(1) to the extent that the Utah statute allows repayment liens on recipients' non-assigned personal injury claims. The Utah Supreme Court fails to consider whether the state law stands as an obstacle to the accomplishment of the purposes of Congress.

Federal law preempts state law where there is congressional intent to preempt the state provision. *Barnett Bank v. Nelson,* 517 U.S. 25, 30 (1996). Congressional intent to preempt exists where there is (1) explicit preemptive language in the federal statute; (2) a statutory structure or purpose expressing clear preemptive intent; or (3) a conflict between the federal and state provision. *Id.* A conflict exists where (a) it is impossible to comply with both provisions or (b) where the state laws undermine the congressional purpose. *Id.* at 31.

The state priority lien provision of Utah Code Ann. § 26-19-5(1) conflicts with and is an obstacle to the federal anti-lien provision because, as interpreted by the Utah Supreme Court, it allows a recovery against the recipient's remaining personal injury claims. In the great majority of personal injury actions, the recipient has a variety of claims against the tortfeasor ("a bundle of sticks" as per *Martin*), including past medical expenses, lost wages, lost earning capacity, disfigurement, etc. Federal law only requires the recipient to assign his or her claim for incurred medical expenses to the state. *See* 42 U.S.C. § 1396k(a)(1)(A) (1992). The recipient retains all of the other "sticks" or claims for damages not assigned. These remaining claims are the property of the recipient. The plaintiffs in the case at hand all had their residual claims infringed when the State liened their settlements at 100%, recovering funds from the residual claims held by the recipient. The state is only

entitled to its one stick (for MA paid), but is in reality recovering the entire bundle of sticks.

The preemption analysis performed by the Utah Supreme Court in *S.S.* and relied on in its opinion below in *Houghton* does not comply with this Court's rule in *Barnett Bank*. The Utah Supreme Court relied on its precedent in *S.S.*, which evaded the question of whether the Utah lien law undermines the congressional intent of the federal anti-lien law. *Houghton*, 57 F.3d at 1068, ¶4. In that opinion, the court found, "a federal statute will preempt a state statute only in the case of an actual conflict unless the federal statute has been shown to preemptively occupy the field .... We find no irreconcilable conflict here...." *S.S.*, 972 P.2d at 443. The preemption analysis in *S.S.* rested primarily on the issue of whether compliance with both statutes was possible. The opinions do not address to what extent the Utah lien provisions circumvent the intent and purposes of the federal anti-lien provision. Indeed, the court did not address, "whether, under the circumstances of this particular case . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963); *Barnett*, 517 U.S. at 31 (1996).

C. How the Priority Impairs Recipients' Claims.

To illustrate the devastating effect of the priority on the recipient, elaboration of the example on page 10 is in order. Suppose a 39-year-old woman was severely injured in an automobile accident where a third person is at fault, rendered permanently and totally disabled, and unable to pay for her medical treatment. The State expends $107,000 in MA to pay for her care. She retains an attorney to recover from the third party tortfeasor. Her total claim would have a conservative value of $500,000, including damages for pain and suffering, future lost wages and future medical expenses, as well as the State's claim for medical

assistance paid. The attorney is successful in negotiating a $110,000 settlement, the limit of insurance coverage, but the State levies it priority lien for its entire amount of $107,000 or 97.3% of the settlement. After the State takes its priority, the victim is left with only about 2.7% of the recovery, or $3,000 which is only .006 of her damages (a little more than ½ of 1%).

On the other hand, if the priority was not in place, the settlement would be *apportioned* among all parties according to their respective claims. The breakdown would look something like this: the State would be entitled to $107,000/$500,000 = 21.4% x $110,000 = $23,540; and the victim would be entitled to $393,000/$500,000 = 78.6% x $110,000 = $86,460. The practical effect of the State's priority in the hypothetical is to unfairly and illegally take the victim's rightful share of the settlement proceeds. The priority in this example costs the victim about $83,000 ($86,460 - $3,000) of the recovery, dollars meant to provide for her needs and future care. This $83,000 priority is an illegal *de facto* lien or recovery on the property of the victim recipient which violates the anti-lien provisions of § 1396p.

D. <u>Apportionment is Implied at Law and Fair</u>.

This Court may reasonably construe the existing statutes and cases as requiring apportionment where the settlement is insufficient to pay all claims fully. Apportionment resolves any ambiguities or conflicts in the statutes and previous cases, and is sound public policy. The most reasonable interpretation of this body of law is that the State has a valid lien against settlement proceeds in the *full amount it has paid,* but so does the recipient have a valid claim for *the full amount of his/her damages* (after deducting the State's MA claim). Where the amount of the settlement or judgment is sufficient to pay both claims in full, there is no argument. However, where the settlement does not pay everyone in full, it will be apportioned among the claiming parties, including the recipient. Apportionment of competing claims is the

rule under ordinary common law and satisfies the dual requirements that the State pursue reimbursement from third party tortfeasors while refraining from recovering against the recipient.

POINT III

— Conflict in the Law of the States —

CERTIORARI SHOULD BE GRANTED WHERE STATE SUPREME COURT DECISIONS OR STATUTES CREATE DIFFERENT STANDARDS OR AN INCONSISTENCY IN DEALING WITH OR INTERPRETING A FEDERAL STATUTE.

As noted above in the Statement of the Case, there currently exists a serious conflict between the *Martin* decision and appellate court decisions in other states. *See* the list of cases cited by the majority opinion in *Houghton,* 57 P.3d at 1069, fn. 5. However, aside from *Martin,* other states have recognized, by case law or statute, the need to apportion TPL settlements between the State Medicaid plan and the recipients' other non-medical assistance claims. This is the only way to protect the state's lien and avoid running afoul of the federal anti-lien provisions. For example, a Missouri statute provides:

> The court may reduce and ***apportion the department's lien proportionate to the recovery of the claimant.*** The court may consider the nature and extent of the injury, economic and noneconomic loss, settlement offers, comparative negligence as it applies to the case at hand, hospital costs, physician costs, and all other appropriate costs.

Missouri Rev. Stat. § 208.215(11) (2001) (emphasis added). This statutory scheme allows the trial court to take into account multiple factors in apportioning the recovery.

Indiana likewise requires the apportioning of settlements that do not result in full recovery:

> If a subrogation claim or other lien or claim that arose out of the payment of medical expenses or other benefits exists in respect to a claim for personal injuries or death and the claimant's recovery is diminished:
>
> (1) by comparative fault; or
>
> (2) by reason of the uncollectibility of the full value of the claim for personal injuries or death resulting from limited liability insurance or from any other cause;
>
> ***the lien or claim shall be diminished in the same proportion as the claimant's recovery is diminished.*** The party holding the lien or claim shall bear a pro rata share of the claimant's attorney's fees and litigation expenses.

See Indiana Code § 34-51-2-19 (2001) (emphasis added). The Indiana Court of Appeals recently interpreted this statute as requiring an apportioned reduction of the Medicaid lien:

> [T]he Legislature intended that the [medical agency] have a lien to the extent of the Medicaid funds expended by the office, except where the claimant's recovery is diminished by comparative fault or by the uncollectibility of the full value of the claim resulting from limited liability insurance or from any other cause. In such instances (where the claimant's recovery is diminished), ***the lien is then diminished by the same proportion that the claimant's recovery is diminished.*** Thus, because Pedraza's recovery was diminished by 80%, the Medicaid lien in this case should likewise be reduced by 80%.

Pedraza v. Grande, 712 N.E.2d 1007, 1011 (Ind. App. 1999) (emphasis added).

The New Mexico Court of Appeals ordered apportionment of TPL proceeds based on equitable principles in *White v. Sutherland*, 585 P.2d 331 (N.M. App. 1978). In that case, the plaintiff was rendered quadriplegic by the careless acts of a chiropractor who tendered his $100,000 policy. The State paid $39,000 in medical assistance and asserted a reimbursement lien for the first $39,000 of the settlement proceeds, claiming it was "subrogated to any rights of the recipient against a third party for recovery of medical expenses." *Id.* at 334. Relying on the earlier anti-lien predecessor to § 1396p, the New Mexico court refused to enforce the lien, opting instead for an equitable division of the settlement money based roughly on proportions. *Id.*

Other states have followed Missouri, Indiana, and New Mexico in ordering apportionment of TPL settlements. Alabama apportions between Medicaid and recipients, according to the value of the respective claims:

> 42 U.S.C. § 1396(a)(25)(C) does not specifically require or even suggest 100% recovery [by the state]. Rather, equitable principles should be applied to determine Medicaid's right of recovery and such would depend on the facts of each case.

Smith v. Alabama Medicaid Agency, 461 So.2d 817, 820 (Ala. App. 1984). Florida has likewise ordered apportionment:

> [The state] is entitled to a lien against and to seek reimbursement from amounts received by a medical assistance recipient from third parties. However, that amount to which [the state] is entitled should be determined in each case on a ***pro rata or proportionate basis*** according to what percentage of the total damages sustained is recovered by the medical assistance recipient and what percentage of those damages should equitably be

> characterized as a recovery for past medical services or expenses.

Underwood v. Dept. of Health Rehab. Serv., 551 So.2d 522, 526 (Fla. App. 1989) (emphasis added). Tennessee has similarly found that the state is not required to recover in full, but that the trial court should be able to apportion the TPL settlement, because federal statutes:

> simply mandate that a state seek reimbursement from a legally liable third party; the provisions do not require that a state acquire a full subrogation recovery, nor do they supplant a state's law with regard to the applicability of the made whole requirement as it relates to subrogation.

Blankenship v. Estate of Bain, 5 S.W.3d 647, 653 (Tenn. 1999).

Apportioning the proceeds from the TPL settlement is the only fair thing to do. After all, the recipient by definition is a person in financial straits who has petitioned the State for medical assistance. Many of the plaintiff class members have been severely and permanently injured in their accidents and require long term, specialized care. The proceeds from their TPL claims are meant to provide for these expenses and give the recipients some financial security. Apportionment is a great leveling factor because no matter how small or big the settlement, the State and the injured recipient still get a just *proportion* of recovery. There is equality here.

The Court should note that the purpose of the Medicaid program is to provide assistance to those who need medical care. The purpose is not to provide short term State loans to recipients for medical expenses, loans that must later be repaid. The recipients have valid claims for real damages; they should get proportional footing with the State in seeking the settlement proceeds.

CONCLUSION

The State's priority constitutes an illegal lien or recovery under federal law because it takes a disproportionate amount - sometimes the entirety - of the recipient's TPL recovery. The State's priority is therefore preempted. Utah and federal statutes clearly contemplate an independent third party tort claim by the recipient, as long as the claim does not include the State's medical assistance claim.

On the other hand, the State's claim is statutorily limited to the amount of medical assistance it has paid. At the moment of settlement, therefore, there are two valid claims on the settlement proceeds, the State's medical assistance lien and the recipient's claim for all other damages. The application of the priority substantially impairs or destroys the recipient's claim, which is inconsistent with the many state and federal statutes which purport to protect that claim, and is thus preempted. The only way to resolve this apparent conflict, while protecting the interests of both the State and the recipient, is to apportion the claims as many other states do. This apportionment is implied by the statutes and Utah case law, and is fair.

It is important for this Court to grant certiorari, resolve the conflict among the states and do justice for impoverished Medicaid recipients.

Dated this 14th day of January, 2002.

Respectfully Submitted,

s/ Robert B. Sykes
Robert B. Sykes, Esq.
Attorney for Petitioner

[APPENDIX A]

This opinion is subject to revision before final
publication in the Pacific Reporter.

IN THE SUPREME COURT OF THE STATE OF UTAH

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Paul Houghton, Billie Henderson,
individually and each as
representative of a class,
Damian Henderson, Wayne Rubens,
Ron Roes and Susan Roes, who
are other members of these
classes, similarly situated,
Plaintiffs and Appellants,

v.

Department of Health,
the Office of Recovery Services,
the Department of Human Services
and the State of Utah
(the "State Defendants"), et al.,
Defendants and Appellees.

No. 20001103

FILED

October 18, 2002

2002 UT 101

Third District, Salt Lake County
The Honorable Ronald Nehring

Attorneys:
Robert B. Sykes, Salt Lake City, for plaintiff
Mark L. Shurtleff, Att'y Gen., Reed M. Stringham III, Steve A. Combe, Brent A. Burnett, Asst. Att'ys Gen., Salt Lake City, for defendants

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DURRANT, Associate Chief Justice:

¶¶1 This appeal concerns priority liens and attorney fees related to Medicaid recipients' settlements with third parties. In this class action lawsuit, the district court certified two classes of plaintiffs, both of which contend on appeal that the State's priority lien on plaintiffs' settlement proceeds violates federal law and that the district court erred in granting the State's motion for judgment on the pleadings on this issue. One class ("Class II plaintiffs"), whose members retained attorneys, also argues that the district court incorrectly granted the State's motion for summary judgment on the issue of attorney fees. We affirm the district court's approval of the State's priority lien, but reverse its grant of summary judgment on the attorney fees claim brought by Class II plaintiffs and remand for further proceedings consistent with this opinion.

BACKGROUND

¶¶2 In reviewing a grant of a motion for judgment on the pleadings, we accept "the factual allegations in the complaint as true" and "consider such allegations and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff." Healthcare Servs. Group v. Utah Dep't of Health, 2002 UT 5, ¶¶ 3, 40 P.3d 591 (internal quotation and citation omitted). Additionally, "[i]n reviewing a grant of summary judgment, we review the facts and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party." Regal Ins. Co. v. Bott, 2001 UT 71, ¶¶ 2, 31 P.3d 524. We recite the facts accordingly.

¶¶3 Pursuant to section 26-19-5(1)(b) of the Utah Code,(1) the State of Utah placed priority liens on proceeds from settlements that Medicaid recipients ("plaintiffs") had negotiated with the third parties who had injured them. On October 27, 1995, plaintiffs brought a class action suit against the State, claiming, among other things, that section 26-19-5(1)(b) was inconsistent with federal law prohibiting liens against Medicaid recipients' property and therefore

invalid. The district court certified two classes of plaintiffs, Class I and Class II.(2) Both classes were composed of Medicaid recipients on whose settlement proceeds the State had placed a priority lien. Only Class II, however, included members who had retained counsel, both for making claims against liable third parties and negotiating lien payments with the State. Class II plaintiffs claimed that the State did not offset from its recovery the attorney fees Class II plaintiffs had incurred in negotiating their settlements and demanded reimbursement.

¶¶4 On October 27, 1999, the State moved for judgment on the pleadings, arguing that our decisions in S.S. v. State, 972 P.2d 439, 442 (Utah 1998), and Wallace v. Estate of Jackson, 972 P.2d 446, 448 (Utah 1998), which upheld the validity of liens on third-party Medicaid settlements, nullified plaintiffs' claims. The district court granted the motion with respect to the priority lien issue, ruling that S.S. and Wallace rendered plaintiffs' attack on the priority lien invalid, but denied the motion with respect to attorney fees on the ground that those decisions did not address that issue.

¶¶5 On May 24, 2000, the State moved for summary judgment on the remaining issue of attorney fees, submitting affidavits claiming that Class II's named members had either not incurred attorney fees or had already received their offset. In response, Class II plaintiffs submitted the affidavit of an attorney stating that he represented two individuals entitled to attorney fees related to their settlements with third parties and that the State had refused to allow offset of those fees. On June 21, 2000, Class II plaintiffs filed a "First Request for Production of Documents," seeking evidence regarding Medicaid recipients who had incurred attorney fees in retaining attorneys to help them negotiate their third-party settlements. The State refused the request, claiming that the language used in the discovery request was overly broad, and moved for a protective order against producing the documents plaintiffs had requested. On July 25, 2000, plaintiffs moved to compel production of evidence,(3) but on November 13, 2000, the district court granted the State's motion for

summary judgment and dismissed plaintiffs' claim with prejudice, reasoning that the claims of all plaintiffs, named and unnamed, failed on the merits because the named plaintiffs either had not retained attorneys or had already received their offset from the State.

¶¶6 Plaintiffs appeal, and we have jurisdiction pursuant to Utah Code Ann. §§ 78-2-2(3) (Supp. 2001). On appeal, both classes of plaintiffs abandon their argument that subsection 26-19-5(1)(b) is invalid under federal law prohibiting liens against Medicaid recipients' property and instead maintain that the priority of the State's lien has the effect of violating federal law. Class II plaintiffs further maintain that the failure of the named plaintiffs' claims for attorney fees does not moot the claims of the unnamed class members.

ANALYSIS

I. STANDARD OF REVIEW

¶¶7 Because both a judgment on the pleadings and a summary judgment involve questions of law, we review both for correctness and accord the district court's decision no deference. In re Estate of West, 948 P.2d 351, 353 (Utah 1997).

II. LEGALITY OF THE PRIORITY LIEN

¶¶8 It is well settled in Utah that liens against third-party settlement proceeds do not violate federal law because settlement payments do not become a recipient's property until Medicaid is reimbursed.(4)S.S., 972 P.2d at 442 (Utah 1998) ("Payments made by a third party do not legally become the property of the recipient until after a valid settlement, which necessarily must include reimbursement to Medicaid.") (emphasis added); State v. McCoy, 2000 UT 39, ¶¶ 10, 999 P.2d 572; Wallace, 972 P.2d at 448. Plaintiffs concede that the State's lien itself does not violate federal law, but argue that the lien's priority status gives it an illegal effect. Specifically, plaintiffs contend that because the priority of the State's lien allows the State to reimburse itself completely and

before Medicaid recipients can use the settlement proceeds to satisfy their claims, the lien could result in a seizure of the recipient's property. They argue that this could occur because, after the State takes its share of settlement proceeds, there may be nothing left with which Medicaid recipients can be compensated for their nonmedical claims, and nonmedical claims are a Medicaid recipient's property. We disagree.

¶¶9 The federal statute requires only that a lien not encumber a Medicaid recipient's property and places no additional restrictions on the priority of otherwise valid liens. We have already held on three occasions that liens against third-party settlement proceeds are valid because those proceeds do not become a Medicaid recipient's property until Medicaid is reimbursed, see McCoy, 2000 UT 39 at ¶¶ 10, S.S., 972 P.2d at 442, Wallace, 972 P.2d at 448; thus, a priority lien on a recipient's third-party settlement proceeds does not encumber the recipient's property, even if those proceeds include compensation for nonmedical claims. Accordingly, the district court correctly concluded that the State's priority lien on Medicaid recipients' third-party settlement proceeds did not violate federal law prohibiting liens against Medicaid recipients' property.(5)

III. ATTORNEY FEES

¶¶10 Having concluded that the State's priority lien against Medicaid recipients' third-party settlements is permissible under federal law, we next examine Class II plaintiffs' argument that the district court erred in granting the State's motion for summary judgment and dismissing their claims for attorney fees with prejudice. The State concedes that the district court erred in dismissing Class II plaintiffs' claims with prejudice, but maintains that the error was harmless because Class II plaintiffs received no notice of either the class action or its dismissal and so are not bound by the district court's decision. The parties therefore agree that the

district court erred with respect to the attorney fees issue; they differ only in the remedies they propose. Class II plaintiffs ask us to reverse the district court's grant of summary judgment, while the State asks us to simply modify the district court's dismissal so as to be without prejudice, thereby allowing unnamed Class II plaintiffs to reconstitute and begin anew their action for attorney fees. Because reversing the district court's grant of summary judgment and remanding for further discovery places Class II plaintiffs in the same position as if we modified the dismissal so as to be without prejudice, only without the additional steps of reconstituting and refiling, we are persuaded, on judicial economy grounds, to accept Class II plaintiffs' proposal. We therefore reverse the district court on the issue of attorney fees and remand for further discovery.

CONCLUSION

¶¶11 We affirm the district court's ruling approving the State's priority lien on plaintiffs' third-party settlement proceeds. We reverse the district court's grant of the State's motion for summary judgment on Class II plaintiffs' attorney fees claim. We therefore remand for further proceedings consistent with this opinion.

¶¶12 Justice Howe, Justice Russon, and Justice Wilkins concur in Associate Chief Justice Durrant's opinion.

1. Section 26-19-5(1)(b) reads as follows: "The department's claim to recover medical assistance provided as a result of the injury, disease, or disability is a lien against any proceeds payable to or on behalf of the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4)." Utah Code Ann. §§ 26-19-5(1)(b) (1998).

2. The State did not oppose the motion to certify the classes.

3. Additionally, on April 17, 1996, plaintiffs filed a notice of depositions and request for production of documents, requesting,

among other things, the identities of those plaintiffs who had and had not retained counsel. The State countered by moving for a protective order against discovery. On November 20, 1998, plaintiffs moved for a scheduling conference, proposing June 1, 1999, as a deadline for completing discovery. Because the State filed a motion for a protective order on July 11, 2000, we assume that discovery was not completed by this deadline, at least on the issue of attorney fees. We further assume that plaintiffs' attempts at discovery had been unsuccessful.

4. Federal law prohibits the imposition of liens "against the property of any individual . . . on account of medical assistance paid or to be paid on his behalf under the State plan." 42 U.S.C. §§ 1396p(a)(1) (2002).

5. In her dissent, Justice Durham relies heavily on a newly decided Minnesota case, Martin v. Rochester, 642 N.W.2d 1 (Minn. 2002), which criticizes this court's opinions in Wallace and S.S. We decline to abandon our well-established precedent in favor of the Martin approach, which, in our view, would produce "results that would jeopardize the ultimate goal of Medicaid--that the program be the pay[er] of last resort." Calvanese v. Calvanese, 710 N.E.2d 1079, 1082 (N.Y.), cert. denied, 528 U.S. 928 (1999), see also S.S., 972 P.2d at 443. Indeed, the legislative history of the federal statute clearly indicates that Congress specifically "intended [Medicaid] to be the payer of last resort, that is, other available resources must be used before Medicaid pays for the care of an individual enrolled in the Medicaid program." S. Rep. No. 99-146, at 312 (1986), reprinted in 1986 U.S.C.C.A.N. 42, 279. While the dissent and Martin rely heavily on preemption arguments regarding conflicts between state statutes and the "goal," or "purposes of the federal Medicaid scheme," Martin, 642 N.W.2d at 16, neither addresses this overarching goal. Further, it is worth noting that a number of other courts have reached results that--although, like Martin, not controlling--are consistent with the precedent we established in Wallace, S.S., and McCoy, and which we follow today. See

Sullivan v. County of Suffolk, 174 F.3d 282, 286 (2d Cir. 1999) cert.denied 528 U.S. 950; Fla. Agency for Health Care Admin. v. Estabrook, 711 So. 2d 161, 166-167 (Fla. Dist. Ct. App. 1998); Nacino v. Chandler, No. 23572, 2002 Haw. App. Lexis 187, at *36 (Haw. Ct. App., Sept. 11, 2002); Roberts v. Total Health Care, Inc., 709 A.2d 142, 152 (Md. 1998); Waldman v. Candia, 722 A.2d 581, 586 (N.J. 1999); Grey Bear v. N.D. Dep't of Human Servs., 2002 ND 139, ¶¶ 14; Calvanese, 710 N.E.2d at 1082; Wilson v. State, 10 P.3d 1061, 1068 (Wash. 2000), cert. denied, 532 U.S. 1020 (2001).

DURHAM, Chief Justice, concurring and dissenting:

¶¶13 I concur in Part III of the majority opinion, but respectfully suggest that Part II has it wrong.

¶¶14 In companion cases decided in 1998, S.S. v. State, 972 P.2d 439 (Utah 1998), and Wallace v. Jackson, 972 P.2d 446 (Utah 1998), this court followed the example of the New York Court of Appeals in upholding state laws that place a lien on third-party settlement proceeds allocated to Medicaid recipients. SeeCricchio v. Pennisi, 683 N.E.2d 301 (N.Y. 1997). By so doing, this court saved state liens from preemption by a federal statute prohibiting liens on Medicaid recipients' property by holding that "[p]ayments made by a third party do not legally become the property of the recipient until after a valid settlement, which necessarily must include reimbursement to Medicaid." S.S., 972 P.2d at 442. Under the majority's reasoning here, a state's lien attaches to the property of a liable third party, not to a recipient's property. This case provides an opportunity for the court to reexamine the position it adopted four years ago, an opportunity to develop a more refined conception of the property rights created by an incident giving rise to an injury, and an opportunity to ensure that state law conforms to both the letter and spirit of federal mandates.

I. FEDERAL MEDICAID PROVISIONS

¶¶15 The federal law structuring federal and state functions in administering Medicaid simultaneously imposes on states a duty to collect reimbursement and a limit on the means states can employ in fulfilling their collection obligations. States' collection efforts are limited both as to the sources to which they can look for reimbursement and as to the extent to which they may expect reimbursement for Medicaid funds expended.

¶¶16 Federal provisions requiring recipients to assign certain claims to the state suggest that states look for reimbursement to any third parties liable to pay for a recipient's medical expenses. States must condition Medicaid eligibility on assignment to the state of any Medicaid recipient's "rights . . . to payment for medical care from any third party." 42 U.S.C. §§ 1396k(a)(1)(A) (1992). While states are explicitly required to obtain an assignment of rights before an individual becomes eligible for Medicaid, the recipient's rights to payment for medical care are deemed assigned to the state in any event:

(a) A state plan for medical assistance must . . . (25) provide . . . (H) that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services.

42 U.S.C. §§ 1396a(a)(25)(H) (Supp. 2002)(emphasis added). In acquiring a recipient's right to payment from third parties, the state also acquires the right to enforce payment through legal means. The provisions governing claims both actually assigned and those deemed assigned to a state unequivocally give states the right to pursue directly any liable third party for the costs expended by a state for a recipient's medical care.(1)

¶¶17 The federal scheme for reimbursement does not merely provide states with rights to recover their expenditures, it also imposes an obligation to do so.

(a) A state plan for medical assistance must . . . (25) provide . . . (B) that in any case in which such a legal liability is found to exist after medical assistance has been made available on behalf of the individual . . . the State . . . will seek reimbursement for such assistance to the extent of such legal liability.

42 U.S.C. §§ 1396a(a)(25)(B) (Supp. 2002)(emphasis added). While §§ 1396a(a)(25)(B) requires states to seek reimbursement, it does not appear to direct states to look to any particular source for that reimbursement. When read together with the preceding section, however, the contours of the federal collection scheme emerge in greater detail:

(a) A state plan for medical assistance must . . . (25) provide (A) that the State . . . will take all reasonable measures to ascertain the legal liability of third parties . . . to pay for care and services available under the plan, (i) including the collection of sufficient information . . . to enable the State to pursue claims against such third parties[.]

42 U.S.C. §§ 1396a(a)(25)(A) (Supp. 2002) (emphasis added).

¶¶18 The state is thus directed in §§ 1396a(a)(25)(A) to gather information "to enable the State to pursue claims against . . . third parties," and, in the subsection immediately following, is required to seek reimbursement. 42 U.S.C. §§ 1396a(a)(25)(B) (Supp. 2002). The implication is clear that a state's mandate to seek reimbursement is directed to action against third parties. Assignment provisions enable the state to take action directly against third parties, while reimbursement provisions require it to do so.

¶¶19 Two themes emerge from the foregoing examination of these provisions. States are explicitly required to pursue reimbursement for funds expended, and, while §§ 1396a(a)(25)(B) does not specify

from whom that reimbursement is to be sought, reading §§ 1396a(a)(25)(A) and (B) together strongly suggests that it is third parties who are intended to be the source of reimbursement.(2)

¶¶20 The same passages that designate the liable third party as the proper source of reimbursement also set limits on the extent to which a state may recover; the measure of a state's recovery from third parties is not a state's expenditures for medical expenses, but a third party's liability for medical expenses. The federal assignment provision makes assignment of "rights . . . to payment for medical care" a condition of eligibility for Medicaid. 42 U.S.C. §§ 1396k(a)(1)(A) (emphasis added). Similarly, the claims deemed assigned under §§ 1396a(a)(25)(H) are limited to "the rights of such individual to payment by any other party for such health care items or services." 42 U.S.C. §§ 1396a(a)(25)(H) (emphasis added). These limits on the permissible extent of a state's recovery are recapitulated in those provisions imposing a duty on states to seek reimbursement. States are required to ascertain the liability of third parties "to pay for care and services available under the plan,"(3) and, when a legal liability is found to exist, to "seek reimbursement for such assistance [as was provided by Medicaid] to the extent of such legal liability." 42 U.S.C. §§ 1396a(a)(25)(A) and (B) (emphasis added). Thus, the extent of a state's claim against a third party is limited by the third party's liability for medical expenses, not by the third party's total liability to a recipient or by the state's actual expenditures for medical expenses.

¶¶21 These implicit limits in the federal statutes on the sources to which a state may look for reimbursement and on the extent to which the state may recover are supplemented by an explicit limit on both source and extent of recovery:

No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan . . . .

42 U.S.C. §§ 1396p(a)(1) (Supp. 2002). The prohibition on liens on a recipient's property compels states to pursue third parties rather than recipients and prevents states from augmenting from the assets of recipients any deficiencies remaining after collection from third parties.

¶¶22 The scheme set out in 42 U.S.C. section 1396 represents Congress' determination of the appropriate balance between a state's obligation to collect reimbursement for Medicaid expenditures and an individual Medicaid recipient's need to shield property from a state's collection efforts. The two interests serve to limit one another; the federal assignment provisions ensure that a Medicaid recipient cannot retain settlement or judgment proceeds designated for medical expenses, and the federal anti-lien provisions ensure that states cannot use portions of a settlement designated for damages other than medical expenses, belonging to a recipient, to reimburse itself for medical expenses. State laws that attempt to alter this balance by allowing a recipient to retain proceeds intended for medical expenses, or by allowing a state to reimburse itself from proceeds not intended for medical expenses, conflict with this scheme and are subject to preemption.

II. PREEMPTION

¶¶23 In developing standards for analyzing state law preemption, this court has drawn from United States Supreme Court jurisprudence governing the preemption of state law by federal. Although

> Utah case law has addressed preemption several times . . . we have not developed a detailed analytical model for determining preemptive intent. We therefore find it useful to look to the United States Supreme Court which over the years has developed a helpful preemption model . . . .

Price Development Company v. Orem, 2000 UT 26, ¶¶ 12, 995 P.2d 1237. It is congressional intent to preempt that is determinative; "determining whether a particular statute preempts

other law of inferior standing is essentially a question of legislative intent." Gilger v. Hernandez, 2000 UT 23, ¶¶ 9, 997 P.2d 305 (citations omitted). The centrality of congressional intent in preemption analysis is borrowed from the federal analytical model; the question of preemption is

> basically one of congressional intent. Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state law.

Barnett Bank v. Nelson, 517 U.S. 25, 30 (1996) (citations omitted).

¶¶24 Congressional intent to preempt state law can manifest itself in a variety of ways, all of which require preemption of the offending state statutory provisions. While a federal law may explicitly state that it preempts state law in the field, more often the determination of congressional intent requires an inquiry into the purposes underlying the federal law.

> Sometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's "structure and purpose," or nonspecific statutory language, nonetheless reveal a clear, but implicit, pre-emptive intent. A federal statute, for example, may create a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Alternatively, federal law may be in "irreconcilable conflict" with state law. Compliance with both statutes, for example, may be a "physical impossibility," or, the state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Id. at 31 (citations omitted).

¶¶25 Barnett suggests that there are three categories of statutory schemes that can reflect congressional intent to preempt state law: (1) statutes containing explicit language to that effect; (2) statutory structure or purpose revealing a clear preemptive intent; or (3) statutes that result in a conflict between state and federal law. (Conflict preemption is further subdivided into (a) situations in which simultaneous compliance with state and federal law is impossible and (b) circumstances in which state laws undermine congressional purposes.) This court, quoting in Price the foregoing language from Barnett, structured preemption analysis differently. For the three categories of congressional intent described above, this court substituted four equally weighted categories. The impossibility of simultaneous compliance and the undermining of federal purposes become, in the version of preemption analysis articulated in Price, separate categories, not aspects of conflict analysis.

¶¶26 The category under which a court chooses to analyze the preemption issue can have significant effects on the result. When treated as one aspect of conflict between state and federal law, analysis of whether state law tends to undermine federal purposes (category 3(b) under Barnett) is susceptible to being conflated with overt conflict between federal and state law (category 3(a)), and therefore overlooked.(4) In S.S., this court applied the test for preemption in a manner that tended to elide questions of whether the relevant state provisions undermined federal purposes: "a federal statute will preempt a state statute only in the case of an actual conflict unless the federal statute has been shown to preemptively occupy the field . . . . We find no irreconcileable conflict here. . . . " S.S., 972 P.2d at 443 (emphasis added). We have recognized that actual conflict may include conflict with the "provisions or goals" of a statute of superior authority, Smith v. Batchelor, 832 P.2d 467, 472 (Utah 1992) (emphasis added), but the court's analysis of conflicts in S.S. and Wallace focused

primarily on the impossibility of dual compliance. The court explicitly addressed the need to harmonize federal provisions requiring states to seek reimbursement and the federal anti-lien provision, but did not fully examine the purposes the anti-lien provision is intended to serve, or whether the court's resolution is likely to undermine that purpose. The federal jurisprudence on which Utah preemption analysis relies makes it clear that while there is no "infallible constitutional test or . . . exclusive constitutional yardstick" for determining congressional intent, Hines v. Davidowitz, 312 U.S. 52, 67 (1941), the court's

> primary function is to determine whether, under the circumstances of this particular case . . . [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Id.; see also Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141 (1963); 517 U.S. 25 at 31 (1996). An inquiry into the goals underlying a federal statute is a necessary element in a court's preemption analysis, an element this court adopted, and even highlighted, in its statement of the preemption model in Price.

¶27 There is obviously no congressional intent in the federal Medicaid statutes to preempt state legislation altogether; federal law mandates state legislation in the area, albeit in conformity with federal guidelines. Where neither explicit preemption, nor an intent to occupy the field is present, it nonetheless remains possible that state legislation may conflict with or otherwise undermine the purposes and objectives of the federal scheme. This consideration, in addition to those emphasized in S.S. and Wallace, must be part of our preemption calculus.

III. UTAH MEDICAID PROVISIONS

¶28 Utah's Medicaid provisions address the federal requirements of assignment and reimbursement, but in an apparent effort to ensure the state a high degree of flexibility with regard to both the source and extent of reimbursement, are so broadly drafted as to

permit acts that go beyond the limits set by federal law. The statute reads:

The department's claim to recover medical assistance provided as a result of the injury . . . is a lien against any proceeds payable to or on behalf of the recipient by that third party.

Utah Code Ann. §§ 26-19-5(1)(b) (1998) (emphasis added). The state lien provision on its face exceeds federal limits both as to the source and extent of permissible state recovery, since it allows a lien to attach to proceeds on which the recipient has a legal claim and also appears to allow the lien to attach to any proceeds, rather than only to those designated for medical expenses.

¶¶29 In Wallace and S.S. a majority of this court saved the state's lien provision from preemption by the federal anti-lien provision by holding that the settlement proceeds to which the state's lien attaches are the property of the third party, not the designated beneficiary of the settlement. While this reading operated to spare the statute from "actual conflict" with federal law, it comports awkwardly with well-established Utah law determining the effects of judgments on property rights. The court's interpretation of Utah's lien provision rested on the assumption that the subject matter of a judgment (the value determined to be owed to the judgment creditor) is not the property of the judgment creditor at the moment judgment is entered, but remains the property of the judgment debtor. This analysis is difficult to reconcile with other provisions of Utah law that give a judgment creditor a lien in some of the assets of the judgment debtor at the moment judgment is entered:

> [T]he entry of judgment by a district court creates a lien upon the real property of the judgment debtor . . . . located in the county in which the judgment is entered.

Utah Code Ann. §§ 78-22-1(2) (Supp. 2001)(current version at Utah Code Ann. §§ 78-22-1(7)(a) (Supp. 2001).(5) While under Utah law a judgment does not of its own force immediately transfer ownership of real property to the judgment creditor, by statute a

judgment does, the moment it is entered, create a lien on certain types of property owned by the judgment debtor. When this lien is enforced through execution and sale,(6) the proceeds are the property of the judgment creditor. While that property could be made subject to other liens by other creditors, it remains indisputably the property of the judgment creditor; indeed, other liens may attach precisely because the property belongs to the judgment creditor.

¶¶30 While the judgment lien created upon entry of a judgment is not equivalent to ownership of the property to which the lien attaches, it is a form of security for payment that can be readily transformed into ownership. This court has had occasion to observe that "a judgment lien has always been regarded as the highest form of security to a [creditor].(7)" Belnap v. Blain 575 P. 2d 696, 700 (Utah 1978) (citation omitted). Absent explicit statutory language to that effect, it seems unlikely the legislature intended to eliminate judgment liens or to postpone their attachment when the judgment creditor is a Medicaid recipient.(8) The conclusion in S.S and Wallace that the subject matter of a judgment remains the property of the third-party debtor until after Medicaid is reimbursed thus fits awkwardly with a legislative scheme that gives the judgment creditor, at the moment a judgment is entered, a legal interest in property that can be converted into ownership of proceeds through execution and sale.(9) The court's preliminary resolution of the potential conflict between state and federal lien provisions rests on the assumption that the recipient has no legal interest in the proceeds of a judgment; this position is not consistent with Utah statutory and common law concerning the effect of a judgment on the judgment creditor's interest in the subject matter of the judgment.

¶¶31 If Utah's Medicaid statute permits the state to obtain a lien on what is in fact the recipient's property, then Utah's lien provisions would be subject to preemption under the conflict aspect of the preemption model outlined above. A state law that explicitly

permits what is clearly prohibited by federal law makes compliance with both laws impossible.

¶¶32 The notion in Wallace that the money realized from third-party settlements or judgments remains the property of the third party is not an argument informed by Utah's law of property or judgments, but an argument based on statutory construction. The opinion observed that "sections of a statute should be harmonized wherever possible to avoid any conflict between them." Wallace, 972 P.2d at 448. The perceived conflict, however, was not a conflict between state and federal law, but rather one between different provisions of the federal Medicaid statute. Wallace treated the anti-lien provisions of 42 U.S.C. §§ 1396p(a)(1) as potentially conflicting with the mandate that states collect sufficient information to enable them to "seek reimbursement from third parties." Id. (citing 42 U.S.C. §§ 1396a(a)(25)(A)). Congress, the reasoning went, could not have intended that the anti-lien provision would interfere with collection efforts against liable third parties:

> Congress could not have intended to prohibit or inhibit third-party recoveries which it directed in the same Social Security Act . . . . [The anti-lien provision] has coexisted for many years with 42 U.S.C. §§ 1396a(a)(25)(A), a sister section in the Act, which mandates states to seek reimbursement from third parties who are legally liable for the medical payments.

Wallace, 972 P.2d at 448. If the third-party liability recognized in a judgment or settlement remains the property of the third party, then it can be the subject of the state's recovery efforts without violation of the anti-lien provisions.

¶¶33 Wallace's resolution of the potential conflict between obligations to collect reimbursement and to protect some of the recipient's assets did accomplish the goal of harmonizing federal provisions with each other, but it did not address the more important issue of federal goals and state law, required by

preemption analysis. As explained above, the federal provisions can more properly be harmonized by looking to their plain meaning, and without reference to state law. Federal assignment provisions require a recipient to assign claims for medical care to the state as a condition of eligibility for Medicaid. Once these claims are assigned, they are no longer the property of the recipient, but of the agency to whom they are assigned. In pursuing the liability of third parties for medical expenses, or in enforcing a lien on proceeds payable by a third party for medical expenses, the state is enforcing its own property rights and not those of the recipient, who has already assigned them to the state.

¶¶34 The Minnesota Supreme Court has recently adopted this interpretation of the federal law and its preemptive implications relative to state law in Martin v. Rochester, 642 N.W.2d 1 (Minn. 2002). The Minnesota court likens a tort victim's claims against a liable third party to a "bundle of sticks"; federal law requires that certain sticks in the bundle--certain causes of action arising out of the incident that created the need for medical assistance--be assigned to the state, but allows any other causes of action to remain the property of the recipient. Id. at 30.

¶¶35 The analogy to the bundle of sticks, familiar to students of property law, operates to harmonize federal collection provisions with the protections federal law creates for the assets of Medicaid recipients. Federal assignment requirements do not, under this approach, conflict with the anti-lien provision because the event that gives rise to a need for medical care also creates multiple rights. While federal law requires that a Medicaid recipient assign the state all rights to recover for medical expenses from any liable third party, the recipient retains all rights to recover for any other damages:

> [T]he state becomes the sole owner of the claim against any third parties for medical expenses. But the recipient retains ownership of the remaining sticks in the bundle--that is to say, the claims for pain and suffering, emotional distress,

> disability, disfigurement, loss of earnings, and loss of earning capacity.

Martin, 642 N.W.2d at 30-31. State laws providing for liens on that portion of a settlement or judgment designated for medical expenses do not conflict with federal anti-lien provisions because the rights to these proceeds have been completely assigned to the state and are thus no longer a recipient's property.(10) State liens on proceeds designated for damages other than medical expenses violate the federal prohibition on liens since those proceeds have not been assigned and thus remain the recipient's property.

¶¶36 The property created by a third party's liability is not a single, undifferentiated mass, nor is a recipient's claim on any element of that property necessarily identical to her claim on any other element. The Martin court rejects the analysis in cases such as S.S. and Wallace because of their unwillingness

> to recognize that a personal injury tort action against potentially liable third parties comprises more than a right to recover for medical expenses. The tort action includes claims for pain and suffering, emotional distress, loss of earnings, and other familiar tort claims. The part of any settlement attributable to these unassigned claims is the property of the medical assistance recipient during his life, and the state has no right to these claims under the assignment. So while the . . . [Utah court is] correct in . . . [its] conclusion . . . that a recovery for medical expenses is not the property of a medical assistance recipient . . . [it] ignore[s] the part of the recovery or settlement for claims other than medical expenses.

Martin, 642 N.W.2d at 57-58. The Martin court links the federal assignment and collection provisions: it is only claims for medical expenses that have been assigned and it is only proceeds of claims for medical expenses that the state can collect. The state obtains the right to precisely what has been assigned; the federal anti-lien

provision prevents the state from acquiring a broad and undifferentiated right to collect its reimbursement from any other proceeds payable by the third party to the recipient.

¶¶37 A sweeping and indiscriminate right to third-party payments, rejected by the Martin court, is precisely what the majority today creates. If the rights assigned and retained by a recipient are not differentiated, then a state may obtain reimbursement even from payments designated for causes of action and damages other than those for medical expenses. The court today reaches the conclusion that because our precedent allows liens on settlement proceeds, "a priority lien on a recipient's third-party settlement proceeds does not encumber the recipient's property, even if those proceeds include compensation for nonmedical claims." (emphasis added). The measure of the state's recovery thus becomes the state's expenditures, not the amount of the third party's liability. This result is not compelled by our precedents; even if third-party payments remain the property of the third party until after Medicaid is reimbursed, it does not necessarily follow that all third-party payments, however designated, may be used to reimburse the state.

¶¶38 Two years ago this court addressed the extent to which the state can recover its expenditures against settlement proceeds. See Office of Recovery Servs. v. McCoy, 2000 UT 39, 999 P.2d 572. While the majority's language might appear to give the state the right to satisfy its lien against the entire proceeds payable to the recipient, the holding should be restricted to its facts, and its language should not be over-read. In McCoy the court read the state lien provision as giving the state "a lien against the entire settlement proceeds, including both the amount designated as medical payment and the amount designated as bodily injury payment." Id. at ¶¶ 12. What is comprehended in a settlement for "bodily injury" is difficult to define, and may be virtually indistinguishable from payment for medical expenses. Because a payment for bodily injury may include, and, indeed, may be limited to, payments for medical expenses, McCoy need not be read to compel the holding that

claims for damages not assigned to the state--and not required to be assigned to the state--and clearly designated as payments for damages other than medical expenditures, can be the subject of a state lien to recover Medicaid expenditures.

¶¶39 Not only do our precedents not require the conclusion that all third-party settlements are available in their entirety to satisfy state claims for Medicaid reimbursement, there is in fact support in our case law for the proposition that the recipient retains some claims--and some rights to payment--despite state assignment provisions. The majority opinion in Wallace holds that harmony between the federal assignment and anti-lien provisions may be achieved "if that part of the insurance proceeds assigned . . . [by the recipient] to the state are considered to not be . . . [the recipient's] property . . . ." Wallace, 972 P.2d at 448 (emphasis added). Our precedent recognizes that only some of the proceeds, only some of the rights to payment, are assigned to the state, and that those rights that are not assigned are retained by the recipient. If only a part of the insurance proceeds is assigned to the state, the state cannot collect against payments flowing from those rights retained by the recipient.

¶¶40 Even if our precedent to the effect that state liens on third-party payments do not violate federal anti-lien provisions is correct, the conclusion that the state's lien must be satisfied to its full extent before the recipient may have any interest in the payments does not necessarily follow. The state has an interest in property in the hands of a third party because of the relationship between that third party and the recipient; the relationship that creates the state's interest may be construed as limiting the extent of the state's interest. An analogy to the rules governing garnishment illustrates the point: having a right to property in the hands of a third party does not necessarily create an entitlement to the entire obligation owed by the third party. Utah Rule of Civil Procedure 64D governs garnishment, the process by which debts and other obligations owed by a third party to a debtor may be reached by the debtor's creditors.

The fact that garnishment provides a means by which third-party obligations may be reached, however, does not mean that the circumstances of the relationship between debtor and garnishee may be ignored. The right of setoff embodied in Utah Rule of Civil Procedure 64D(m) demonstrates the continuing importance of the relationship between debtor and garnishee in determining the extent of the garnishor's right to be satisfied from the third party's property. Possession of a lien includes no guarantee of its full satisfaction.

¶¶41 The state Medicaid provisions on which we relied in McCoy are not completely without ambiguity. Utah law provides that

> the department may recover in full from the recipient or any party to which the proceeds(11) were made payable all medical assistance which it has provided and retains its right to commence an independent action against the third party . . . .

Utah Code Ann. §§ 26-19-7(2)(b) (1998). Whether or not this provision guarantees full reimbursement depends on the construction placed on the word "may." "May" can either suggest that it is possible that the state will recover its expenditures in full or that the state is invariably allowed to recover in full. While nothing in the statute compels the interpretation that a full recovery is only a permissible, not an inevitable, outcome, it is equally true that the statute does not require the result the court reaches today.

CONCLUSION

¶¶42 Our precedent and the approach adopted by the Minnesota Supreme Court both purport to harmonize competing obligations imposed by federal law. The majority in Wallace supported the proposition that third-party payments remain the property of the third party until after Medicaid has been reimbursed primarily with the principle that "sections of a statute should be harmonized so as to avoid any conflict between them." Wallace, 972 P.2d at 448 (emphasis added). That interpretation is not necessary to the harmonization of the statute, however. The better approach, and the

one I believe is required by the federal preemption principles discussed herein, suggests that a court's "primary function" in determining if state law is preempted by federal law is to determine whether state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941). A reimbursement scheme that eviscerates the federal purpose of shielding some recipient assets from state collection efforts is incompatible with the protection for recipients evident in the federal scheme.(12) The analytical model this court has adopted in the past and extends today does not properly account for congressional intent and the operation of preemption; it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. The model recently adopted by the Minnesota Supreme Court harmonizes federal purposes with state law in a far more logical, supportable, and fair manner than the path chosen by the majority.

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1. Whether or not a recipient retains a right to pursue assigned claims for medical expenses depends on the applicable state statute and the scope of the assignment.

2. The language of the federal assignment provision also suggests that the recipient's role is to assist the state in collecting from liable third parties, rather than to be a source of reimbursement. Section 1396k(a)(1)(C)(1992) mandates that state law require the recipient

> to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved.

42 U.S.C. §§ 1396k(a)(1)(C)(emphasis added). The role of the recipient in the federal scheme is to assign rights to payment to the state, §§ 1396k(a)(1)(A); to cooperate in establishing paternity and obtaining support payments under specified circumstances, §§ 1396k(a)(1)(B); and to assist the state in identifying liable third parties (unless it is not in the recipient's best interest to do so), §§ 1396k(a)(1)(C). Thus, the recipient's role in this scheme is largely to assist the state in fulfilling its own responsibilities. The qualification of the duty to cooperate in identifying liable third parties in §§ 1396k(a)(1)(C) is particularly telling; the federal scheme imposes some obligations on the recipient, but those obligations can give way if they undermine the recipient's best interests. It seems unlikely that a plan so solicitous of recipients' interests would nevertheless allow states to strip recipients of what is likely to be their only financial resource: settlement proceeds.

3. The language of section 1396a(a)(25)(A) suggests that even some claims for medical expenditures may be retained by the recipient. A state is entitled to capitalize on the third party's liability for medical expenses covered under Medicaid. Should a third party's liability for medical expenses extend beyond what is provided by Medicaid, these additional expenditures, according to the language of section 1396a(a)(25), appear to be unavailable for state reimbursement.

4. The Tenth Circuit Court of Appeals has contributed a useful categorization of "at least" four circumstances in which preemption can occur:

> (1) express preemption, which results when Congress expresses a clear intent to preempt state law, (2) implied preemption, which results when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," (3) conflict preemption, which results from an actual conflict between federal and state law even though Congress is silent, and (4) field preemption, which results from a determination that

> Congress intended to remove an entire subject from state regulatory authority.

Evans v. Bd. of County Comm'rs, 994 F.2d 755, 760 (10th Cir. 1993) (citations omitted).

5. After July 1, 2002, it is no longer entry of a judgment, but recordation of the judgment in the office of the county recorder, that creates a lien on real property. Utah Code Ann. §§ 78-22-1(7)(a) (Supp. 2001).

6. Levy of execution "is ordinarily the only proper method to enforce a judgment lien." Belnap v. Blain, 575 P.2d 696, 700 (Utah 1978).

7. Belnap misquotes its source, Kinney v. Valentyne, 541 P.2d 537. In Kinney the court observed that "a judgment lien has always been regarded as the highest form of security to a creditor." Id. at 539 (quoting Morton v. Adams, 124 Cal. 229 (1899) (emphasis added). In Belnap this court cited Kinney, but mistakenly stated that a judgment lien is security for a judgment debtor, rather than a judgment creditor.

8. The state provision does give priority status to its Medicaid lien:

> The department's claim to recover medical assistance provided . . . is a lien against any proceeds payable to or on behalf of the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs. . . .

Utah Code Ann. §§ 26-19-5(1)(b) (1998). The lien provision does not, however, alter the method established in Utah Code Ann. §§ 78-22-1(2) for determining whose property the proceeds are. The Medicaid lien does not attach to real property, but to "proceeds payable" to the recipient. Since the statute does not define proceeds, recourse to the definition in Black's Law Dictionary is appropriate. Black's defines proceeds as "[t]he value of land, goods, or investments when converted into money." Black's Law Dictionary

1222 (7th ed. 1999). The state Medicaid lien would thus attach to the money realized from an execution sale. The money realized by an execution sale is indisputably the property of the judgment creditor, here the Medicaid recipient, even if those proceeds are subject to liens. A state law that permits a Medicaid lien on the property of the Medicaid recipient expressly contradicts the federal anti-lien provision and is thus subject to preemption.

9. Treating the statutory judgment lien provisions as a real-property exception to the rule that a judgment creates no property interest in the subject matter of the judgment would lead to arbitrary results. It seems most unlikely that the legislature intended that the victim of a tortfeasor whose primary assets are real property should obtain a property interest (protected by the federal anti-lien statute) in the subject matter of a judgment, while the victim of a tortfeasor whose primary assets are personal property should obtain no property interest in the subject matter of a judgment (and thus no protection from the federal anti-lien statute).

10. Even the assignment of rights to payments for medical expenses may not be as complete as the Minnesota Court suggests, since 42 U.S.C. §§ 1396k(b) requires that if the amount the state collects under the assignment provisions of §§ 1396k(a)(1)(A) exceeds amounts expended by the state and federal governments, "the remainder of such amount collected shall be paid to such individual." 42 U.S.C. §§ 1396k(b) (1992). While it is no doubt unusual for the state to collect an amount in excess of its expenditures, the provision is of some use in discerning the extent to which the assignment of rights, even to collect for medical expenditures, is complete; the recipient retains some interest in the claim to medical expenses even after assigning the right to collect to the state. The very structure of Utah's law suggests a tacit recognition that the recipient retains some right to pursue third parties even for medical expenses: "the assignment [of the right to third party-payments for medical expenses] was not exclusive, as evidenced by Medicaid's willingness to allow recipients to pursue

third-party recovery actions independently . . . . [The recipient] still retained the right to sue for and receive third-party payments . . . . " Wallace, 972 P.2d at 450 (Durham, J., dissenting).

11. Because the statute does not define proceeds, it is possible that this and other portions of state law (including the lien provisions of Utah Code Ann. §§ 26-19-5(1)(b)) could be saved from preemption by a judicial interpretation of proceeds that restricts the term's meaning in this context to recovery for medical expenditures alone.

12. The anti-lien provision, the creation of supplemental needs trusts (which allow assets to be held in trust for the medical and other needs of the recipient without defeating Medicaid eligibility), 42 U.S.C. §§ 1396p(d)(4)(A) (Supp. 2002), and provisions mandating the return to the recipient of amounts in excess of state and federal expenditure all underline Congress' intention both to protect recipients' assets from state claims for reimbursement and to protect recipients from ineligibility resulting from an overabundance of assets.

[APPENDIX B]

42 USCS § 1396p(a) and (b) (1998):

§ 1396p. Liens, adjustments and recoveries, and transfers of assets

(a) Imposition of lien against the property of an individual on account of medical assistance rendered to him under a State plan.

(1) No lien may be imposed against the property of any individual prior to his death on account of medical assistance paid or to be paid on his behalf under the State plan, except--

(A) pursuant to the judgment of a court on account of benefits incorrectly paid on behalf of such individual, or

(B) in the case of the real property of an individual--

(i) who is an inpatient in a nursing facility, intermediate care facility for the mentally retarded, or other medical institution, if such individual is required, as a condition of receiving services in such institution under the State plan, to spend for costs of medical care all but a minimal amount of his income required for personal needs, and

(ii) with respect to whom the State determines, after notice and opportunity for a hearing (in accordance with procedures established by the State), that he cannot reasonably be expected to be discharged from the medical institution and to return home, except as provided in paragraph (2).

(2) No lien may be imposed under paragraph (1)(B) on such individual's home if--

(A) the spouse of such individual,

(B) such individual's child who is under age 21, or (with respect to States eligible to participate in the State program

established under title XVI [*42 USCS §§ 1381* et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [*42 USCS § 1382c]*, or

(C) a sibling of such individual (who has an equity interest in such home and who was residing in such individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), is lawfully residing in such home.

(3) Any lien imposed with respect to an individual pursuant to paragraph (1)(B) shall dissolve upon that individual's discharge from the medical institution and return home.

(b) Adjustment or recovery of medical assistance correctly paid under a State plan.

(1) No adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan may be made, except that the State shall seek adjustment or recovery of any medical assistance correctly paid on behalf of an individual under the State plan in the case of the following individuals:

(A) In the case of an individual described in subsection (a)(1)(B), the State shall seek adjustment or recovery from the individual's estate or upon sale of the property subject to a lien imposed on account of medical assistance paid on behalf of the individual.

(B) In the case of an individual who was 55 years of age or older when the individual received such medical assistance, the State shall seek adjustment or recovery from the individual's estate, but only for medical assistance consisting of--

(i) nursing facility services, home and community-based services, and related hospital and prescription drug services, or

(ii) at the option of the State, any items or services under the State plan.

(C) (i) In the case of an individual who has received (or is entitled to receive) benefits under a long-term care insurance policy in connection with which assets or resources are disregarded in the manner described in clause (ii), except as provided in such clause, the State shall seek adjustment or recovery from the individual's estate on account of medical assistance paid on behalf of the individual for nursing facility and other long-term care services.

(ii) Clause (i) shall not apply in the case of an individual who received medical assistance under a State plan of a State which had a State plan amendment approved as of May 14, 1993, which provided for the disregard of any assets or resources--

(I) to the extent that payments are made under a long-term care insurance policy; or

(II) because an individual has received (or is entitled to receive) benefits under a long-term care insurance policy.

(2) Any adjustment or recovery under paragraph (1) may be made only after the death of the individual's surviving spouse, if any, and only at a time--

(A) when he has no surviving child who is under age 21, or (with respect to States eligible to participate in the State program established under title XVI [*42 USCS §§ 1381* et seq.]) is blind or permanently and totally disabled, or (with respect to States which are not eligible to participate in such program) is blind or disabled as defined in section 1614 [*42 USCS § 1382c];* and

(B) in the case of a lien on an individual's home under subsection (a)(1)(B), when--

(i) no sibling of the individual (who was residing in the individual's home for a period of at least one year immediately before the date of the individual's admission to the medical institution), and

(ii) no son or daughter of the individual (who was residing in the individual's home for a period of at least two years immediately before the date of the individual's admission to the medical institution, and who establishes to the satisfaction of the State that he or she provided care to such individual which permitted such individual to reside at home rather than in an institution), is lawfully residing in such home who has lawfully resided in such home on a continuous basis since the date of the individual's admission to the medical institution.

(3) The State agency shall establish procedures (in accordance with standards specified by the Secretary) under which the agency shall waive the application of this subsection (other than paragraph (1)(C)) if such application would work an undue hardship as determined on the basis of criteria established by the Secretary.

(4) For purposes of this subsection, the term "estate", with respect to a deceased individual--

(A) shall include all real and personal property and other assets included within the individual's estate, as defined for purposes of State probate law; and

(B) may include, at the option of the State (and shall include, in the case of an individual to whom paragraph (1)(C)(i) applies), any other real and personal property and other assets in which the individual had any legal title or interest at the time of death (to the extent of such interest), including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.

[APPENDIX C]

Utah Code Ann. § 26-19-5 (1989):

(1) When the department provides or becomes obligated to provide medical assistance to a recipient because of an injury, disease, or disability for which a third party is liable, the department may recover the medical assistance directly from that third party. The department's claim to recover medical assistance provided as a result of such an injury, disease, or disability is a lien against any proceeds payable to the recipient by that third party. This lien has priority over all other claims to the proceeds, except claims for attorney's fees and costs authorized under Subsection 26-19-7(4).

(2) The department shall mail or deliver written notice of its lien to the third party at its principal place of business or last known address. The notice shall include the recipient's name, the approximate date of injury, a general description of the type of injury and, if applicable, the general location where the injury is alleged to have occurred.

(3) The department may commence an action on its lien in its own name however, that lien is not enforceable as to a third party unless:

(a) the third party receives written notice of the department's lien before it settles with the recipient; or

(b) the department has evidence that the third party had knowledge that the department provided or was obligated to provide medical assistance.

(4) The department may waive a claim against a third party in whole or in part, or may compromise, settle, or release a claim or lien.

(5) An action commenced under this section does not bar an action by a recipient or a dependent of a recipient for loss or damage not included in the department's action.

[APPENDIX D]

Utah Code Ann. § 26-19-7 (1989):

(1) (a) A recipient may not file a claim, commence an action, or settle, compromise, release, or waive a claim against a third party for recovery of medical costs for an injury, disease, or disability for which the department has provided or has become obligated to provide medical assistance without the department's written consent.

(b) The department has an unconditional right to intervene in an action commenced by a recipient for recovery of medical costs connected with the same injury, disease, or disability, for which it has provided or has become obligated to provide medical assistance.

(2) If the recipient proceeds without the department's written consent as required by Subsection (1)(a), the department is not bound by any decision, judgment, agreement, or compromise rendered or made on the claim or in the action. The department may recover in full from the recipient all medical assistance which it has provided and retains its right to commence an independent action against the third party, subject to Subsection 26-19-5(3).

(3) The department's written consent, if given, shall state under what terms the interests of the department may be represented in an action commenced by the recipient.

(4) The department may not pay more than 33% of its total recovery for attorney's fees, but shall pay a proportionate share of the costs in an action that is commenced with the department's written consent.

[APPENDIX E]

Utah Code Ann. § 26-19-17:

Application of provisions contrary to federal law prohibited. In no event shall any provision contained in this chapter be applied contrary to existing federal law.

[APPENDIX F]

42 U.S.C. 1396a(a)(25):

(25) provide--

(A) that the State or local agency administering such plan will take all reasonable measures to ascertain the legal liability of third parties (including health insurers, group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1167(1)]), service benefit plans, and health maintenance organizations) to pay for care and services available under the plan, including--

(i) the collection of sufficient information (as specified by the Secretary in regulations) to enable the State to pursue claims against such third parties, with such information being collected at the time of any determination or redetermination of eligibility for medical assistance, and

(ii) the submission to the Secretary of a plan (subject to approval by the Secretary) for pursuing claims against such third parties, which plan shall be integrated with, and be monitored as a part of the Secretary's review of, the State's mechanized claims processing and information retrieval systems required under section 1903(r) [42 USCS § 1396b(r)];

(B) that in any case where such a legal liability is found to exist after medical assistance has been made available on behalf of the individual and where the amount of reimbursement the State can reasonably expect to recover exceeds the costs of such recovery, the State or local agency will seek reimbursement for such assistance to the extent of such legal liability;

(C) that in the case of an individual who is entitled to medical assistance under the State plan with respect to a service for which

a third party is liable for payment, the person furnishing the service may not seek to collect from the individual (or any financially responsible relative or representative of that individual) payment of an amount for that service (i) if the total of the amount of the liabilities of third parties for that service is at least equal to the amount payable for that service under the plan (disregarding section 1916 [42 USCS § 1396o]), or (ii) in an amount which exceeds the lesser of (I) the amount which may be collected under section 1916 [42 USCS § 1396o], or (II) the amount by which the amount payable for that service under the plan (disregarding section 1916 [42 USCS §1396o]) exceeds the total of the amount of the liabilities of third parties for that service;

(D) that a person who furnishes services and is participating under the plan may not refuse to furnish services to an individual (who is entitled to have payment made under the plan for the services the person furnishes) because of a third party's potential liability for payment for the service;

(E) that in the case of prenatal or preventive pediatric care (including early and periodic screening and diagnosis services under section 1905(a)(4)(B) [42 USCS § 1396d(a)(4)(B)]) covered under the State plan, the State shall--

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without regard to the liability of a third party for payment for such services; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(F) that in the case of any services covered under such plan which are provided to an individual on whose behalf child support enforcement is being carried out by the State agency under part D of title IV of this Act [42 USCS §§ 651 et seq.], the State shall--

(i) make payment for such service in accordance with the usual payment schedule under such plan for such services without

regard to any third-party liability for payment for such services, if such third-party liability is derived (through insurance or otherwise) from the parent whose obligation to pay support is being enforced by such agency, if payment has not been made by such third party within 30 days after such services are furnished; and

(ii) seek reimbursement from such third party in accordance with subparagraph (B);

(G) that the State prohibits any health insurer (including a group health plan, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 [29 USCS § 1167(1)], a service benefit plan, and a health maintenance organization), in enrolling an individual or in making any payments for benefits to the individual or on the individual's behalf, from taking into account that the individual is eligible for or is provided medical assistance under a plan under this title [42 USCS §§ 1396 et seq.] for such State, or any other State; and

(H) that to the extent that payment has been made under the State plan for medical assistance in any case where a third party has a legal liability to make payment for such assistance, the State has in effect laws under which, to the extent that payment has been made under the State plan for medical assistance for health care items or services furnished to an individual, the State is considered to have acquired the rights of such individual to payment by any other party for such health care items or services;

(I) [Redesignated]

[APPENDIX G]

42 USCS § 1396k:

§ 1396k. Assignment, enforcement, and collection of rights of payments for medical care; establishment of procedures pursuant to State plan; amounts retained by State

(a) For the purpose of assisting in the collection of medical support payments and other payments for medical care owed to recipients of medical assistance under the State plan approved under this title [*42 USCS §§ 1396* et seq.], a State plan for medical assistance shall--

(1) provide that, as a condition of eligibility for medical assistance under the State plan to an individual who has the legal capacity to execute an assignment for himself, the individual is required--

(A) to assign the State any rights, of the individual or of any other person who is eligible for medical assistance under this title [*42 USCS §§ 1396* et seq.] and on whose behalf the individual has the legal authority to execute an assignment of such rights, to support (specified as support for the purpose of medical care by a court or administrative order) and to payment for medical care from any third party;

(B) to cooperate with the State (i) in establishing the paternity of such person (referred to in subparagraph (A)) if the person is a child born out of wedlock, and (ii) in obtaining support and payments (described in subparagraph (A)) for himself and for such person, unless (in either case) the individual is described in section 1902(l)(1)(A) [*42 USCS § 1396a*(l)(1)(A)] or the individual is found to have good cause for refusing to cooperate as determined

by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(C) to cooperate with the State in identifying, and providing information to assist the State in pursuing, any third party who may be liable to pay for care and services available under the plan, unless such individual has good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the individuals involved; and

(2) provide for entering into cooperative arrangements (including financial arrangements), with any appropriate agency of any State (including, with respect to the enforcement and collection of rights of payment for medical care by or through a parent, with a State's agency established or designated under section 454(3) [*42 USCS § 654*(3)]) and with appropriate courts and law enforcement officials, to assist the agency or agencies administering the State plan with respect to (A) the enforcement and collection of rights to support or payment assigned under this section and (B) any other matters of common concern.

(b) Such part of any amount collected by the State under an assignment made under the provisions of this section shall be retained by the State as is necessary to reimburse it for medical assistance payments made on behalf of an individual with respect to whom such assignment was executed (with appropriate reimbursement of the Federal Government to the extent of its participation in the financing of such medical assistance), and the remainder of such amount collected shall be paid to such individual.

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IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY - STATE OF UTAH

PAUL HOUGHTON, BILLIE HENDERSON, et, al.

Plaintiff,

V.

DEPARTMENT OF HEALTH, THE: OFFICE OF RECOVERY SERVICES,: THE DEPARTMENT OF HUMAN SERVICES AND THE STATE OF UTAH: (the "State Defendants") and

: **ORDER DISMISSING :PLANTIFFS' :COMPLAINT WITH :PREJUDICE**

: **Civil No. 95-0907491cv**

ROB L. BETIT, Director of the Department of Health and Director of Department of Human Services; EMMA CHACONE, Executive Director of the Office of Recovery Services; JOHN DOES 1-50 and JANE DOES 1-50 (the "individual defendants"),	:	**Judge Ronald E. Nehring**
Defendants.	:	

The above-entitled matter came before the court on the 9th day of August, 2000, for a hearing on Defendants' Motion for Summary Judgment, Defendants' Motion for Protective Order, Plaintiffs' Motion for Reconsideration of Ruling, Plaintiffs' Motion to ament the Complaint, and Plaintiff's Motion to Compel Production on Plaintiffs'' First Request for Production of Documents. Defendants were represented by Steven A. Combe, Assistant Attorney General. Plaintiffs were represented by Matthew Raty. The Court heard argument from both counsel and took the motions under

advisement. On October 23, 2000, the Court entered a Minute Entry setting forth it's rulings on the motions. For the reasons set forth in the Minute Entry, the Court now enters the following ORDER:

ORDER

IT IS HEREBY ORDERED as follows:

1. Defendants' Motion for Summary Judgement is granted.

2. Plaintiff's Compliant is dismissed with prejudice.

3. Plaintiffs' Motion for Reconsideration of the Court's March 28, 2000, ruling is denied

4. Plaintiffs' Motion to Amend the Complaint is denied

5. Plaintiffs' Motion to Compel Production on Plaintiffs' First Request for Production of Documents is denied.

6. Defendants' Motion for Protective Order is denied

BY THE COURT:

_____

RONALD E. NEHRING

DISTRICT COURT JUDGE